Excavating, Building Material and Construction Drivers Union Local No. 436, affiliated with International Brotherhood of Teamsters, AFL–CIO *and* SRS, Inc. *and* Cleveland Trinidad Paving Company

Excavating, Building Material and Construction Drivers Union Local No. 436, affiliated with International Brotherhood of Teamsters, AFL–CIO, and Cleveland Trinidad Paving Company *and* The Arms Trucking Co. *and* Bishbro, Inc. *and* SRS, Inc. Cases 8–CC–1486, 8–CC–1488, 8–CE–33, 8–CE–32–1, 8–CE–32–2, and 8–CE–32–3

May 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 9, 1993, Administrative Law Judge Benjamin Schlesinger issued the attached decision. Cleveland Trinidad (Trinidad), the Union, the General Counsel, and Arms, Bishbro, and SRS filed exceptions, briefs and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth below.[2]

We agree with the judge's finding that the strike and picketing by the Union on August 19, 1992,[3] was not in violation of Section 8(b)(4)(i) and (ii)(A) and (B), and that the settlement agreement executed by the Union and Trinidad on August 24 was not unlawful under Section 8(e). The judge found that the Union engaged in the strike and picketing with an object of obtaining, from Trinidad, health and welfare fund contributions on behalf of the owner-operators utilized by Trinidad, based on the belief that they were Trinidad employees for whom such contributions were required. Crediting the testimony of Union Business Agent Tiboni, the judge further found that the Union was not interested in negotiating collective-bargaining agreements with the owner-operators.[4] Similarly, the judge found that the settlement agreement exhibited no secondary object and involved no agreement to cease doing business with owner-operators. Rather, he found that it merely required contributions for the owner-operators who were employees of Trinidad, and therefore did not affect the labor relations of these owner-operators or coerce them to unionize.

In their exceptions, the Charging Parties and the General Counsel contend that the Union conducted its strike and picketing for the purpose of coercing Trinidad to pay health and welfare contributions even for owner-operators that the Union allegedly knew were independent contractors not covered by its collective-bargaining agreement. The General Counsel asserts that the Union did not identify to Trinidad any owner-operators that it believed to be employees, and that the settlement agreement expressly obligates Trinidad to make contributions for all owner-operators and drivers of leased equipment, without any qualification regarding their status as employees. The Charging Parties also point out Tiboni's admission at the hearing that their drivers are not employees of Trinidad.[5]

We find that, even if the object of the Union's strike and picketing were to obtain fund contributions for all of Trinidad's owner-operators, regardless of whether they were employees of Trinidad, this conduct does not constitute a violation of Section 8(b)(4)(i) and (ii)(A) and (B). We further find that the settlement agreement, even if construed as requiring contributions on behalf of individuals not employed by Trinidad, does not violate Section 8(e).

Assuming, arguendo, that the Union's demand for contributions encompassed all of the owner-operators, we find little support in the record for the allegations that the demand affected the labor relations of these owner-operators or attempted to force Trinidad to cease doing business with any of its owner-operators. The Union's conduct was directed solely at Trinidad. The Union was not engaged in representation campaigns involving the owner-operators and did not seek recognition from them. In fact, when a few of the owner-operators sought out the Union at the urging of Trinidad, the Union turned them away. Moreover, as noted above, the judge found, as a matter of credibility, that the Union had no interest in negotiating collective-bargaining agreements with the owner-opera-

[1] Trinidad, the General Counsel, and Arms, Bishbro, and SRS have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] All dates are 1992 unless otherwise indicated.

[4] Some of the owner-operators employ employees.

[5] The General Counsel and the Charging Parties further rely on the Broker Agreement that the Union purportedly wanted the owner-operators to sign, requiring them to tender contributions to the Union's welfare funds and to enter into collective bargaining with the Union within 30 days. The judge accorded little significance to the Broker Agreement, regarding it as the response of an unprepared Tiboni to Trinidad's pressuring the owner-operators to ''sign up'' with the Union and inconsistent with the Union's turning away those owner-operators that did contact it.

tors. Under these circumstances, we do not find that the Union's conduct had an object of interfering with the labor relations between the owner-operators and their employees, coercing the owner-operators to unionize, or causing Trinidad to cease doing business with them.

Similarly, we find that the settlement agreement did not require Trinidad to cease doing business with nonunion owner-operators. The settlement agreement states in relevant part:

> Trinidad agrees to comply and timely tender contributions to the Funds pursuant to the collective bargaining agreement and any subsequent labor agreement containing the same or similar contractual obligations for all owner-operators and drivers of leased equipment for the period beginning September 1, 1992.

By its express terms, the agreement establishes a primary obligation on the part of Trinidad toward the Union. In contrast, we find that the agreement imposes no express or implied obligation on the owner-operators to make fund contributions or to enter into a collective-bargaining relationship with the Union as a condition of continuing their business relationships with Trinidad. The ''owner-operators and drivers of leased equipment'' covered by the agreement are merely third-party beneficiaries of the agreement between Trinidad and the Union. See *Associated General Contractors of Minnesota*, 290 NLRB 522, 531 (1988).[6]

Trinidad's obvious intention to avoid its financial obligations under the agreement by pressuring the owner-operators to establish their own collective-bargaining relationships with the Union, including the responsibility to make fund contributions, and the Union's awareness of that intention, do not alter our conclusion. Trinidad agreed to assume full liability for contributions on behalf of owner-operators, regardless of any intention to pass on the cost of that agreement to the owner-operators. The judge found that, at the time of the settlement agreement, Tiboni emphasized that Trinidad could continue to use nonunion owner-operators, and that the Union had no interest in organizing the owner-operators. We find that under these circumstances Trinidad's desire to avoid the costs inherent in its agreement is insufficient to render the agreement a contract to cease doing business with nonunion owner-operators in violation of Section 8(e).

[6] In *Associated General Contractors*, the Board held a memorandum of understanding requiring health and welfare contributions for independent contractors lawful, noting that union membership was not a requirement for drawing benefits from the funds. In the present case, the trust agreement and bylaws for the Union's welfare fund provide that self-employed owner-operators are eligible for benefits if the company with whom they contract makes payments on their behalf.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. The Respondent, Excavating, Building Material and Construction Drivers Union Local No. 436, affiliated with International Brotherhood of Teamsters, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the union signatory clause contained in the first paragraph of article V, ''Subcontracting,'' of the Northern Ohio Contractors Association collective-bargaining agreement, dated May 1, 1983, as subsequently renewed, by which the Union and Cleveland Trinidad Paving Company are bound.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked ''Appendix A.''[7] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Union's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director for Region 8 sufficient copies of the notice, to be furnished by the Regional Director, for posting by Trinidad, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

B. The Respondent, Cleveland Trinidad Paving Company, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Entering into, maintaining, giving effect to, or enforcing the union signatory clause contained in the first paragraph of article V, ''Subcontracting,'' of the Northern Ohio Contractors Association collective-bargaining agreement, dated May 1, 1983, as subsequently renewed, by which Excavating, Building Material and Construction Drivers Union Local No. 436, affiliated

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

with International Brotherhood of Teamsters, AFL–CIO, and Trinidad are bound.

(b) Knowingly or willfully acting in concert with the Union or assisting the Union in any violation of Section 8(e) of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its place of business and mail to its owner-operators copies of the attached notice marked ''Appendix B.''[8] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 15, 1992.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce the union signatory clause contained in the first paragraph of article V, ''Subcontracting,'' of the Northern Ohio Contractors Association collective-bargaining agreement, dated May 1, 1983, as subsequently renewed, by which we and Cleveland Trinidad Paving Company are bound, to the extent that such provisions in any way violate Section 8(e) of the Act.

EXCAVATING, BUILDING MATERIAL AND CONSTRUCTION DRIVERS UNION LOCAL NO. 436 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

[8] See fn. 7, supra.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce the union signatory clause contained in the first paragraph of article V, ''Subcontracting,'' of the Northern Ohio Contractors Association collective-bargaining agreement, dated May 1, 1983, as subsequently renewed, by which Excavating, Building Material and Construction Drivers Union Local No. 436, affiliated with International Brotherhood of Teamsters, AFL–CIO, and we are bound.

WE WILL NOT knowingly or willfully act in concert with the Union or assist the Union in any violation of Section 8(e) of the Act.

CLEVELAND TRINIDAD PAVING COMPANY

Rufus L. Warr, Esq., for the General Counsel.
John M. Masters, Esq. and *John Swansinger, Esq. (Masters & Collins)*, of Cleveland, Ohio, for the Respondent Union.
Michael Spurlock, Esq. and *Richard A. Galbraith, Esq. (Beery & Spurlock Co., L.P.A.)*, of Columbus, Ohio, for the Charging Parties SRS, Arms, and Bishbro.
Robert S. Stone, Esq. and *James M. Stone, Esq. (McDonald, Hopkins, Burke & Haber Co., L.P.A.)*, of Cleveland, Ohio, for Charging Party-Respondent Cleveland Trinidad.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On August 19, 1992, Excavating, Building Material and Construction Drivers Union Local No. 436, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union), struck Cleveland Trinidad Paving Company (Trinidad), causing it to cease almost all its operations that day. The picket signs stated that the Union was on strike for ''non-payment of benefits,'' and the Union insists that its picketing was wholly primary in nature. To the contrary, the complaint alleges, among other things, that the Union's strike violated Section 8(b)(4)(i) and (ii)(A) and (B) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. and that certain agreements between the Union and Trinidad violated Section 8(e).

Trinidad, an Ohio corporation, with an office and place of business in Cleveland, Ohio, manufactures asphalt and is an asphalt contractor doing paving and general site construction. Annually, Trinidad purchases and receives in Cleveland goods valued in excess of $50,000 directly from points outside Ohio. I conclude that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. For more than 20 years, it has had a collective-bargaining agreement with the Union. It was a member of the Northern Ohio Contractors Association (NOCA), and the last complete agreement that NOCA entered into was one for 3 years, from May 1,

1983, to April 30, 1986. Thereafter, that agreement was extended in brief memoranda, covering only the amounts of wages, dues, and contributions to fringe benefit plans, for 3 years, to April 30, 1989, and then for another 3 years, to April 30, 1992. NOCA entered into no agreement with the Union for any period after April 30, 1992. However, the Union and the Ohio Contractors Association (OCA) executed an agreement, effective May 1, 1992, to April 30, 1995. I conclude, and the Union admits, that it is a labor organization within the meaning of Section 2(5) of the Act.[1]

The recollections of the two principal witnesses were so different and bear so directly on some of the legal conclusions reached herein that it is impossible to recite any facts without making preliminary findings regarding credibility. Most of the issues in this proceeding involve owner-operators. Trinidad transported its asphalt to its construction sites by truck. It did not use its own trucks, because it owned none. Instead, it hired owner-operators to perform the work, and Gary Tiboni, the Union's business agent, questioned whether some or all, depending on the witness to be believed, were not independent contractors but were employees within the meaning of the Act and whether Trinidad should make contributions to the Excavating and Building Materials Drivers' Local Union No. 436 Welfare Fund and Pension Fund (Funds) on their behalf. Trinidad and Gary Helf, its president, consistently denied that the Union ever limited its claim to employees. In its reply brief, it attacked the Union for i2ts ''fabrications,'' the first one of which is as follows:

> [U]ntil it became convenient at the hearing in this matter, the Teamsters never limited its objective only to obtaining benefit contributions on whichever owner/operators of Trinidad were considered to be employees and Teamsters member[s] (i.e., in its brief for the first time, the Teamsters limited its demand for contributions to ''certain owner/operators of Cleveland Trinidad Paving Co. who, in fact, were employees and not independent contractors''). . . . Rather, from the inauguration of the scheme until required by the progress of events at the hearing, the Teamsters consistently sought contributions on *all owner/operators* used by Trinidad. [Emphasis in original.]

That is simply not so. On July 7, 1992, about 1-1/2 months before the strike in this proceeding took place, the Funds, which had brought a Federal court action for an audit of Trinidad's records, moved for partial summary judgment. They objected to Trinidad's failure to produce all its records, calling attention to the issue of Trinidad's ''alleged independent contractors/owner operators its [sic] utilizes,'' and contending that Trinidad, by its failure to permit an audit, ''would be permitted to judge for [itself], without review or challenge, what constitutes an employee and what constitutes an independent contractor.'' The Funds were interested in collecting contributions only for owner-operators who were employees. This is demonstrated by the Funds' opposition to Trinidad's motion for summary judgment:

> Until such an audit proceeds, Plaintiff Trustees are not in a position to decide whether or not contributions are due and owing pursuant to the labor agreement. Once a proper audit proceeds, Plaintiff Trustees shall be in a position to determine whether to demand the contributions from Cleveland Trinidad. Obviously, if plaintiffs conclude that Cleveland Trinidad does not have an obligation to tender contributions on behalf of the alleged non-participants at issue, no demand for contributions shall occur. If, on the other hand, the determination is reached that Cleveland is obligated pursuant to the labor agreements to tender contributions on behalf of such persons, then and only then will a demand for contributions be generated.
>
> Plaintiff Trustees, thus, may never make an actual demand to Cleveland Trinidad for contributions.

This memorandum was filed on July 31, 20 days before the strike. I refuse to believe that Tiboni, who brought the Federal court action as a Trustee of the Funds, was taking a different position from Tiboni as a union representative. The Union was not guilty of any fabrication.

Rather, Helf had very serious problems with telling the truth. His direct testimony about the first meeting he held with Tiboni relating to this issue omitted much of what happened, but his memory was refreshed extensively on cross-examination. He only halfheartedly agreed that Tiboni was demanding contributions on only certain owner-operators who were employees, but then withdrew that testimony, stating that Tiboni considered an owner of 15 or 20 trucks as an owner-operator. He denied that he had made a commitment to Tiboni that he would submit to an audit and pay the contributions found to be due. On cross-examination, however, he admitted confessing to Tiboni that he was a weasel. At that point, I asked him why he would admit to being a weasel for trying to escape from an agreement that he did not have. He answered: ''Maybe I was just being funny.'' That was neither a funny confession to Tiboni nor a truthful answer to me. I find that he was trapped in a lie and was deliberately avoiding the truth. This was a key issue to resolving the motivation for much of the Union's alleged unfair labor practices. I watched Helf closely while he testified and listened carefully to what he said. I believe little of it. The following recitation of facts, therefore, reflects that credibility finding.[2]

The instant disputes began with a meeting held in early 1991 attended by Tiboni and Helf and about five employer

[1] The relevant docket entries are as follows: The unfair labor practice charges in Cases 8–CC–1486 and 8–CC–1488 were filed by SRS, Inc. (SRS), and Trinidad, respectively, on October 13 and December 21, 1992, respectively. The charges in Cases 8–CE–32–1, 8–CE–32–3, and 8–CE–32–3 were filed by the Arms Trucking Co. (Arms), Bishbro, Inc., d/b/a Bishop Brothers (Bishbro), and SRS, respectively, on September 15, 1992. The charge in Case 8–CE–33 was filed by Trinidad on December 21, 1992. The hearing was held in Cleveland, Ohio, on January 26, 27, and 29, March 2–4, and April 7, 1993.

[2] In assessing credibility, there is no doubt that the owner-operators were cooperating fully with Trinidad about their testimony. They knew where their financial interests lay and participated in supplying information requested by Theodore Farr, Trinidad's truck dispatcher (no doubt fostered by Trinidad's attorneys), and voluntarily being interviewed by Trinidad's attorneys. Some of their testimony sounded forced and was likely false, but the falsehoods were of no consequence to my findings here. I had little problem with the credibility of the other witnesses.

members of NOCA, including Ray Schloss Sr., who acted as spokesperson for the group. Tiboni stated that he had a fiduciary duty as a trustee of the Funds to collect contributions for all employees of NOCA signatories. He wanted to discuss with the employers the fact that they were not complying with the collective-bargaining agreement. Tiboni complained that the employers were not employing on their payrolls union members.[3] Rather, the employers were using owner-operators, also known as brokers, whom the employers alleged were independent contractors.

For example, Tiboni noted that Trinidad transported its asphalt to the jobsites with as many as 100 trucks driven by these persons.[4] Tiboni contended that many were really employees of the employers. The employers had complete control of their employment; they worked on a daily basis, being directed what time to start work, where to work, and what routes to follow; they were covered under the employers' health plans; the employers assisted them in their finances; and the employers disciplined them if they did not perform well. These facts were evidence of an employer-employee relationship, Tiboni claimed, the same kind of relationship that union members had with employers under contract with the Union. Because the drivers were employees, the NOCA employers were responsible to contribute for them to the Funds. The Union would not seek to collect past due contributions to the Funds on the owner-operators, if the employers would agree to contribute in the future. Schloss did not agree with Tiboni's position, but, among the employers, there was a fear that, if Tiboni were serious, the employers would be saddled with a huge debt because most of them did not employ their own truckdrivers but used owner-operators for whom no contributions had been made for years.

At a second meeting, the NOCA members, with Helf in attendance, agreed to pay the contributions on the owner-operators who were employees. Helf wanted to make sure that this would not apply to jobs that he had already bid and completed. John Masters, the Union's and Funds' attorney, drafted a ''settlement agreement'' resolving the dispute and requiring that the employers submit to an audit to determine who were their employees, and then paying on them. The Funds' trustees approved the agreement, but the members of NOCA refused to sign it. No employer was willing to comply with anything that Tiboni wanted. The Funds tried to audit Trinidad's books and records, but Trinidad refused to permit an audit for any persons other than those it conceded were its employees. In other words, Helf showed no records pertaining to its owner-operators. So, on December 10, 1991, Tiboni, acting as a trustee and on behalf of the trustees of the Funds, instituted an action in the United States District Court for the Northern District of Ohio, Eastern Division (1:91 CV 2495) for an audit of Trinidad's books and records to determine the amounts due for contributions and for payment of such amounts as may be due. The action specifically pertained to the liability of Trinidad, if any, for those of its owner-operators who were employees.

The NOCA agreement expired on May 1, 1992,[5] and Schloss wrote Tiboni that the employers who were members of the association had no intention of bargaining as a multiemployer group and were on their own to negotiate with the Union separately. Accordingly, Tiboni contacted individual employers, former members of NOCA, to conduct negotiations for a new agreement. Helf stated that his 1992–1995 agreement came about because 1 day, sometime before he signed the agreement on June 5, perhaps as early as March, he and Tiboni discussed the increases that the Union wanted for the year. Tiboni said that Helf was one of the first employers with whom Tiboni had met, and Tiboni asked for an across-the-board pay increase of $1 per hour yearly for 3 years and an increase of the contributions to the Funds. Helf thought that the increases were very reasonable and stated that he would agree with them if everyone else in the industry also agreed.

After that, however, Tiboni was unable to obtain that increase from the rest of the industry, and he reduced the Union's requested wage increase to 35 cents for each of the 3 years. Tiboni told Helf that he thought that they should end their dispute about the audit. Helf agreed to do so, committing to permit an audit and agreeing to pay the Funds on the owner-operators who the Funds determined were his employees. On June 5, John Banno, the Union's secretary-treasurer, brought a two-page memorandum collective-bargaining agreement to Helf. Helf asked Banno whether the agreement was the same as he had previously. Banno said that it was. Helf testified that he did not need the full contract, that the wages were right, and that he would simply sign the two-page agreement, which he did. Helf also testified that he specifically asked about the subcontracting clause, which had been part of the expired NOCA contract and provided as follows:

> All work covered under the scope of this Agreement to be performed on the job site shall be subcontracted only to an employer who is a party to a current, written collective bargaining agreement with the union. In such subcontracts, provision shall be made to required [sic] subcontractors to adhere to the conditions of this collective bargaining agreement.

[3] In fact, Trinidad employed only three or four drivers represented by the Union. Three are called ''carryall drivers'' and transport equipment to and from the jobsites. The other drives a fuel truck. The Union included in its brief an affidavit and various exhibits to support its allegation (and to impeach Helf) that Trinidad previously employed as many as 14 Teamsters members. All the other parties moved to strike these documents, as well as others. The Union filed a response, which incorporated yet another affidavit. On August 3, 1993, Trinidad filed a reply brief. I grant the motion. The Union gave no reason for failing to introduce the proof that it now seeks to elicit. At some time, the hearing must end. Without a motion to reopen the hearing, supported by sufficient justification that the evidence sought to be introduced was newly discovered or previously unavailable or that extraordinary circumstances warranted reopening the hearing, there is no reason to permit the Union to try this proceeding by affidavit and introduce further material that the other parties have no opportunity to is without merit. Sec. 102.48 of the Board's Rules and Regulations. Furthermore, the proposed affidavit and exhibits relate to credibility and, even if I were to consider them as truthful (Trinidad claims that they relate to entirely different facts), they would not make Helf's credibility worse.

[4] All the parties understood that the term ''owner-operators'' included truckers who owned only one truck, which they drove, and businessmen, who owned dozens of trucks and did not drive at all.

[5] All dates hereafter mentioned refer to the year 1992, unless otherwise stated.

> All such work assignable to employees covered under the scope of this Agreement not to be performed at the job site shall be subcontracted only to an employer who observes the wages, and benefits of overall labor cost established herein. No such work shall be subcontracted on terms that fail to require subsequent employers to adhere to these conditions.
>
> p. All trucks will be manned by members of Local Union #436 or applicants hereto. This Agrement [sic] shall not apply to pick-up trucks assigned by the Contractor to engineering or technical employees, clerical employees, timekeepers, superintendents, assistant super-intendents, [sic] supervisors in charge, of any classes of labor or supervisory personnel, and shall not apply to trucks used in greasing or repairing heavy equipment. (''Greasing'' or ''repairing'' as used in this paragraph shall not be construed to include fuel trucks.)
>
> q. All deliveries of materials made from, on, and around a job site, shall be done exclusively by employees of contractors who are a part of the bargaining unit classified herein, including the busing and transporting of men.

Banno replied that it was also the same. Helf said that there was no sense arguing about the subcontracting clause because that was in litigation. (Trinidad had defended the Federal court action on the ground, among others, that the subcontracting clause violated Section 8(e) of the Act and that, therefore, no contributions on owner-operators were owing.) He was not going to delay his execution because of the district court action.

But Helf reneged on his agreement with Tiboni, refusing to permit the audit and to make contributions on the owner-operators. On August 19, the Union struck. No work was performed by the members of the Union or any of Trinidad's other employees, who honored the Union's picket line. No trucks, except two or three, reported for work. Some honored the Union's picket line; Helf canceled the work of others. All the paving jobs were halted, despite Helf's plea to Banno to permit Trinidad to work. Trinidad had about 50–75 employees and equipment in the field at a paving job, but, without asphalt, they were unable to do any work.

Trinidad attempted to obtain a restraining order before the judge in the Federal court action, without success. Its attorney, Robert Stone, advised Helf that he could ask another judge for the same relief, but that would take a day or two. That afternoon, Tiboni telephoned and asked Helf whether he was ready to settle and threatened that ''[W]e'll be back if you don't.'' Helf said that he was ready, that he could not ''take another day of this.''[6] Tiboni insisted on a signed agreement, and he wanted it that night, because Helf had repeatedly broken his word. Helf admitted that he had lied about permitting an audit and making contributions, and further admitted that he had attempted to ''weasel'' out of his commitments. They set up an appointment for later that day.

When Helf and Tiboni met, and they met with their attorneys, Tiboni already had the agreement prepared, and they discussed its terms.[7] Helf was concerned about the additional costs that he would be incurring if he had to make contributions on the owner-operators and said that he would send the drivers to the Union to talk to Tiboni. Tiboni replied that he would not sell books to the brokers, that he had not sold a book for simply carrying a union card ''unless they were under contract with us. And if he did that, and sent them down there, they would have to talk to me [Tiboni] about labor agreements.'' Masters cautioned Helf that he could not force his owner-operators to join the Union. Helf expressed his concern that he was the only employer that had to make contributions to the Funds and that his competitors would not be subject to the same requirement. Tiboni replied: ''[T]omorrow we will be on their doorstep [d]oing the same thing that we did to you.'' Helf said that he had no choice: he could not afford to pay on his truckers and he would ''have to send the guys down.'' (Helf's desire to transfer his obligation to someone else was not unusual. For example, he wanted other employers to share his legal expenses to defend against the Funds' lawsuit. Later, when he and the Union signed the settlement agreement, discussed below, that is attacked as an 8(e) agreement in this proceeding, he wanted the Union to indemnify him if the settlement agreement should be attacked by the independent truckers.)

The Union demanded $2000 for legal fees incurred in the Federal court action; but Helf did not want his commitment put in writing because he did not want to infuriate Stone, if he saw it. The meeting ended with Helf's agreement to permit an audit, but no agreement was signed at that time. Masters agreed to make the certain changes that Helf had requested and have a revised document ready for the next day. It was understood that an agreement would be signed, and the Union did not strike again. However, although Helf later signed the agreement, he refused to pay any contributions until the court acted in the Federal action. When the initial unfair labor practice charge was filed, Tiboni called Helf and reminded him that he had never said that he had to use union truckdrivers. Helf agreed that he had said that.

The agreement was finally signed on September 1. It made reference to the NOCA agreement which ''define[d] work'' as follows:

> The term ''owner-operator'' includes a person or persons who own their own pieces of equipment and hire out said equipment to the Contractor for the performance of bargaining unit work herein. The term driver of leased equipment includes an ''owner-operator'' and a driver of equipment owned by another person who hires out or leases one or more pieces of equipment to the Contractor for the purpose of performance of bargaining unit work herein.

The agreement continued with a waiver by the Funds of any and all contributions that may have been owed by Trinidad on behalf of owner-operators and drivers of leased equipment for the period ending August 31, 1992; and Trinidad committed:

[6] Helf said that he could not afford to lose another day's work during his paving season, which is restricted because asphalt cannot be laid in the cold winter months. The paving season in northeastern Ohio runs from April to early December.

[7] Trinidad attorney James Stone refused to participate because he believed that the agreement was illegal. However, he remained in the room for a period of time. Stone was not called as a witness. I infer that his testimony would not have been helpful to Trinidad.

> to comply and timely tender contributions to the Funds pursuant to the collective bargaining agreement and any subsequent labor agreement containing the same or similar contractual obligations for all owner-operators and drivers of leased equipment for the period beginning September 1, 1992.

On September 11, Trinidad distributed a letter to its owner-operators and drivers of leased trucks advising them, despite Tiboni's advice that Helf had the right to use nonunion owner-operators, that under Trinidad's contract with the Union, they had to ''be signed'' with the Union ''as a bona fide union member.'' They had to pay union dues and had to make contributions to the Funds. Helf added:

> We have a commitment to continue utilizing your trucks on a daily basis; however we also have a binding union agreement and collective bargaining requires that we hire *union* subcontractors and drivers as first priority.

The letter further states: ''However, if you are the owner of only one truck, you do not have to acknowledge this request.'' There was little testimony about this sentence. Trinidad did not ask for an ''acknowledgment'' of the letter from its truckers who owned more than one truck. Thus, ''acknowledgment'' must have been used to indicate that Helf was not asking the owner-operators of one truck to sign a Union contract, especially because he understood that Tiboni had said that he did not sell books. This analysis is bolstered by the fact that the truckers to whom the letter was sent by certified mail appear not to be the owner-operators of one truck. The quoted sentence thus shows that Helf knew that the Union was claiming that the owner-operators-drivers of one truck were his employees and thought that he might be found to be the employer of even the larger companies.

Helf testified that he then asked that the drivers contact the Union. Helf called a few himself to let them know what had happened and to tell them to go to the Union. For, example, he told Don Bishop of Bishbro and Howard Bates of Arms that they would have to sign up at the Union and that meant that they had to pay for health and welfare coverage for their employees. Bates, for example, replied that he would not, and Helf replied that, if he did not, he would not work for Trinidad. He had an agreement with the Union, he said, that the truckers would join the Union. Whether all this is true or whether this was a setup for the institution of this proceeding, and I am more inclined to the latter finding, I admit to an uncertainty. Helf sent others to the Union, and they reported to him that the Union was not ready to deal with them. Helf then telephoned Tiboni, who verified that people had come down and that he was not ready with an agreement. About a week or 10 days later, Tiboni sent Helf a ''Broker Agreement,'' in blank and on the Union's letterhead, which was purportedly the agreement that he expected the owner-operators to sign. That agreement stated:

> This letter serves to advise Teamsters Local Union No. 436 that will tender contributions to the Welfare Funds in accordance with the provisions of the Building Supply Agreement on all employees at the rate of $2.15 per hour on all hours worked. _____ further agrees that within the next thirty (30) days *it will institute negotiations with Teamsters Local Union No. 436 on the subject of wages, hours, terms and other conditions of employment*. [Emphasis added.]

Notwithstanding all of Helf's alleged threats and letters, Farr continued to call the same truckers. Indeed, contrary to what Helf testified, he was never told by Helf not to call Arms and to cease calling nonunion owner-operators. As a result, there is no evidence that Trinidad withheld trucking work from any of its contractors because they had no agreement with the Union or because they were not members of the Union. In fact, but for Arms, which simply was not called because there was no work for it, the same truckers continued to work for Trinidad after the strike, as they had before, without a union contract and without their employees joining the Union. Furthermore, Helf never paid the $2000 that he had agreed to pay as the Union's legal expenses, because he believed that the entire contract was illegal.

No one on behalf of the Union ever made a demand for recognition or for a contract from any of the persons or corporations that supplied trucks to Trinidad. The Union never contacted Arms, Bishbro, or anyone else in an effort to persuade them to sign a collective-bargaining agreement with the Union. Nor did the Union picket Arms or anyone else at their facilities or at the places where their trucks were located, except for the August 19 strike against Trinidad. Nor did the Union approach any of the employees of any of the owner-operators to solicit their membership in the Union or to demand that they pay Union dues. It was only Trinidad that made this demand on its owner-operators.

The complaint alleges that the Union's August 19 strike was an attempt to enforce the subcontracting provision (art. V) of the NOCA agreement, quoted above at page 365. The Union contends that, as of August 19, 1992, there was no NOCA agreement that would have been binding on Trinidad. I agree. NOCA disbanded in the spring of 1992, and there is no evidence that it continued in existence. Certainly, there is no evidence that it made any agreement with the Union for any period after the expiration of the 1989–1992 extension.[8] That being so, the Union contends that the provision did not exist because the agreement that Helf signed was the OCA agreement; and that did not contain that provision. The memorandum he signed said as much on its face, to wit:

> May 27, 1992
>
> CONSTRUCTION AGREEMENT EFFECTIVE 5–1–92 to 4–30–95
>
> O.C.A. 5–18–92

[8] The General Counsel, Trinidad, and the Charging Parties note that the settlement agreement referred to the existing agreement between the Union and NOCA. Masters testified that the settlement agreement was originally prepared at a time when the NOCA agreement existed and that the continued reference to NOCA was made only because it was contained in the original agreement and the new agreement was prepared in some haste. However, the entire settlement agreement is premised on the existence of the NOCA agreement, so it is probable that in August 1992 the Union did not perceive of the reference to that collective-bargaining agreement as a mistake. However, I need not decide, and do not, that had Masters considered the reference to NOCA, he would have changed it to OCA. I merely find that NOCA is referred to in the settlement agreement because it was referred to in the earlier draft.

It also stated on the line which Helf signed: ''Ohio Contractors Association Agreement And Local Construction Agreement.''

Helf testified that he never saw the references to OCA. I have grave doubts that, even if he did, he paid any attention to them. He was not a member of OCA. Tiboni never mentioned that he wanted Helf to sign the OCA agreement or commit to its terms. I find that he did not. Moreover, the memorandum recited that: ''[A]ll other language in the *current* Labor Agreement will remain in effect.'' (Emphasis added.) All he knew was that he was signing an agreement with the same terms as his expired agreement, the NOCA agreement. The mere fact that there was some writing on the document referring to the OCA agreement was insufficient to put him on notice that he was signing that agreement. To the contrary, when Banno presented the new agreement to Helf for his signature (he signed it on June 5), Banno told him that the agreement would be exactly the same as Helf had before; and Banno affirmed that it included the illegal provision. The Union did not call Banno as a witness to refute this testimony. Accordingly, I find that the illegal clause was contained in the agreement that Helf signed.

Tiboni testified that the Union had never enforced the first paragraph of the subcontracting provision, which had been in the agreement since at least 1977, because ''that clause could possibly be illegal.'' He was right. The clause violated Section 8(e) of the Act, the relevant portion of which reads as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting or work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

The Union does not contend that the first paragraph of the subcontracting provision, the union signatory clause, which requires that all work be subcontracted to union employers, is legal. Indeed, it admits that union signatory clauses are presumptively invalid. *Retail Clerks Local 1428 (Jones & Jones)*, 155 NLRB 656 (1965). I agree. I conclude that the clause violates Section 8(e), as the complaint alleges.[9]

I do not find a similar violation in the OCA agreement. There were no facts elicited in this proceeding that Tiboni demanded that Trinidad comply with that agreement or the Local Construction collective-bargaining agreement and particularly certain provisions found under ''Definitions,'' ''B,'' item 4, and items 47 through 58. Paragraphs 8 and 9 of the complaint, dated November 30, 1992, refer to some of these provisions, but many were not even mentioned in the complaint. The allegations are dismissed, particularly because the settlement agreement does not rely on the OCA agreement, either.

The remaining allegations of the complaint relate to the Union's picketing and its aftermath. To the claims that its conduct was secondary, the Union defends that all its conduct was primary, aimed at Trinidad because of its refusal to pay contributions to the Funds for its owner-operators, many of whom are its employees. The General Counsel and the Charging Parties argue, to the contrary, that all are independent contractors and that the Union's actions were aimed at organizing the drivers.

Trinidad owns no trucks and leases no trucks. It has its asphalt delivered to its paving sites solely by owner-operators. The truckers contracted by Trinidad range from an owner who operates his sole dump truck to others who may or may not drive and own 2, or 3, or 4, or 5, or 8, or 10, or 15 or more trucks.[10] They purchased and paid for their trucks,[11] and the trucks are registered in their names and do not have Trinidad's name on them.[12] They purchased their own license plates. They obtain and pay for their own liability and workmen's compensation insurance (Trinidad requires that all its owner-operators supply certificates of coverage for both). They pay their own income taxes for their own businesses, and they have their own Federal identification numbers. They pay their own traffic tickets.[13] The owner-operators pay for the drug testing on the owners and their own employees. (Trinidad pays for drug testing of its own employees, but not its owner-operators.) They park their trucks on their own rented lots or in their own garages, all at their own expense.[14] They do not park on Trinidad's premises. They pay for all maintenance of their trucks.[15]

Many of the owners of one or a few trucks drive almost exclusively for Trinidad,[16] and some of them have worked

[9] The Union does not contend that it is entitled to the protection of the proviso. *Teamsters Joint Council 42 (Irvine-Santa Fe Co.)*, 248 NLRB 808, 815–817 (1980).

[10] Morabito Trucking is the largest trucker in the area, and has about 50–100 trucks. It does about $200,000 of business with Trinidad yearly. However, it is a union trucker and makes contributions to the Funds. Accordingly, the Union raises no issue about Trinidad's right to work with Morabito.

[11] These are substantial purchases. Some trucks were valued at $29,500, $36,000, and even $60,000 to $120,000.

[12] About 5 years before, Trinidad worked at the airport. Federal Aviation Administration regulations required that all trucks entering the airport property have identification, and so Trinidad decals, stating that the trucks were carrying Trinidad materials, were attached to the trucks. These were used solely for that job.

[13] However, when a truck is overloaded because of Trinidad's fault, Bishbro will bill to Trinidad the cost of a traffic ticket. Arms pays the tickets of its drivers, but its independent contractors must pay their own tickets.

[14] Weaver parked at home.

[15] Arms performs its own repairs. It owns a mobile mechanical truck that fixes trucks at the jobsite or on the road. Bishbro makes or pays for its own repairs. In case a truck has broken down, neither Arms nor Bishbro charges Trinidad for that downtime. They bear the cost for their own trucks, and their independent contractors bear the cost for their own trucks.

[16] Willie Weaver and Lee Anderson are exceptions. Weaver, the owner of one truck, hired an employee to do most of his driving in 1992. Anderson, the owner of four trucks, drove for Trinidad about 75 percent of his time. His other three trucks worked on Trinidad's business only half their running time.

for it for 10 to 20 years. Some operate in their own names, and others use business names.[17] Some submit their statements of services to Trinidad in the names of their businesses; some, in their own names. Some advertise their services; most do not. Some have business telephones; most do not. The larger contractors do not devote all their trucks to Trinidad, day after day. Arms, for example, worked for 30 to 40 other companies in the northeastern Ohio area and had gross revenues in 1992 of $3.6 million, only $15,000 to $20,000 came from Trinidad. Bishbro has 35 other customers and received about $80,000 from Trinidad, less than 10 percent of its total business. During the paving season, Bishop sometimes will not work for Trinidad for 2 or 3 weeks. Some, like Arms and Bishbro, may combine jobs on trucks in a single day, so that a truck may haul sand, gravel, limestone, or rock salt for another customer and spend only part of the day hauling for Trinidad.

In some of the smaller firms, the owner does not drive at all. Some of the owner-operators lease trucks to other drivers, who assume the position of independent contractors of the owner-operators. The owner does not pay them wages but pays them a percentage of what it earns from its customer. Most of the other owner-operators hire drivers to drive the trucks that they do not drive and pay them wages, deducting the applicable taxes. The owner-operators conduct road tests to see whether their applicants for employment are good drivers. Although it has not happened, if a driver with too little experience were sent to the job, Trinidad would probably advise the owner-operator that it did not want that driver to return. It does not reprimand drivers employed by the independent contractors, but it evaluates the performance of its owner-operators daily. On occasion, it has reprimanded one for poor performance.

The larger owner-operators conduct their business in the same way as the smaller ones. For example, Arms employs its own drivers and owner-operators (it leases the trucks by the hour) and, when it works for Trinidad, it may send its own trucks or trucks owned by owner-operators. It employs 15 drivers, which only it had hired and has the right to fire. Arms pays its drivers a commission, and it deducted Federal, state, and social security taxes and unemployment insurance. Arms makes unemployment payments to the Ohio Bureau of Employment Services and covers its employees for workmen's compensation, health insurance, and vacation pay. It issues W-2 forms to its drivers. Bishbro employs eight drivers,[18] but it also uses some independent contractors, both individual owner-operators and small truckers who own several trucks and even larger companies, like Arms.[19] Bishbro provides its employee-drivers with $10,000 life insurance and makes health insurance available to them, but gives them the option of additional wages instead.

The work performed by the owner-operators follows a set pattern. Most of the trucks are ordered to report by Trinidad's dispatcher for a certain time in the morning, such as 7 and 7:30 a.m.[20] The drivers report to the dispatcher,[21] who gives them a ticket. Then they report to the asphalt manufacturing plant, where plant operators employed by Trinidad and represented by another union dump asphalt into their trucks.[22] Trinidad prints a ticket showing the amount of material picked up. The driver places a tarpaulin over the load and proceeds to the jobsite that Trinidad has directed to make the delivery. Often the driver has already been advised of the location of the site by his employer. Trinidad will usually not advise a driver about what route to take, but will tell the driver when it knows of some traffic accident or road construction. The driver does not have to follow Trinidad's suggestion. The trucks wait in line; and when their turn comes, they dump the asphalt.[23] No one supervises them. When the delivery has been completed, the driver returns to Trinidad to get another load of asphalt and returns to the jobsite. The job continues until Trinidad advises the driver that no more loads are to be hauled that day,[24] and Trinidad signs the driver off the job. The dispatcher may then assign the owner-operator a job for the following morning or, alternatively, advises him by telephone later that evening. The owner-operators have the right to refuse an assignment.[25]

The rates for the work of the smaller owner-operators are generally established at the beginning of the paving season and do not usually change during the year. Trinidad pays an hourly rate for the hauling of asphalt. These rates differ, depending principally on the size of the equipment—the larger the capacity of the truck, the higher the rate. For example, in 1992, Trinidad paid one trucker $35 an hour for his work, but another $40. The hauling of other material, such as sand, rock, or gravel, is paid by the ton. Generally, the rates were not set as a result of negotiations. Trinidad merely announced what the rates would be. However, from time to time, various truckers approached Helf and stated that they could not make a decent profit at the rate that had been paid the previous year. Helf then set a new rate that satisfied the drivers. On other occasions, for example, if the cost of fuel rose, a ''tremendous increase,'' Trinidad might have to renegotiate the rates. On the other hand, the larger owner-operators, such as Arms and Bishbro, simply set their own rates, and Trinidad could either accept those rates or look for another trucker.

The smaller brokers render invoices to Trinidad twice a month, setting forth their services for the previous half month, on forms prepared by Trinidad. Trinidad's book-

[17] Some owner-operators are certified as contractors by the Ohio Department of Transportation or certified as independent minority contractors, so that they can be utilized as subcontractors on Ohio and other Government contracts. In order to qualify for this certification, the independent operators cannot be affiliated with Trinidad but are required to be distinct and separate business entities.

[18] On occasion, Don Bishop will drive a truck.

[19] Bishbro sends to Trinidad only its own trucks and only those driven by its own employees.

[20] Trinidad attempts to stagger the reporting time of the trucks so that they can be efficiently loaded. It can load only a certain number of trucks each hour.

[21] There was testimony that the drivers report to the foreman, who checks them in in the morning and out at the end of the day. Whether the dispatcher or the foreman performs this function is inconsequential.

[22] The driver may decide on the quantity he wishes to haul.

[23] No one tells the drivers when to dump their loads of asphalt, because it is obvious when each truck is the next to do so.

[24] On a few occasions, the driver may be called by his company to leave the Trinidad job and report elsewhere.

[25] Many of the truckers worked for Choice Construction, a minority subcontractor of Trinidad with whom Choice works very closely. (Helf had no financial interest in Choice.) Trinidad's dispatcher assigned them to that work, and many of them thought that they were working for Trinidad, when they were actually working for Choice.

keeper reviews the invoices, approves or disapproves them, and pays them, twice a month.[26] Trinidad pays only the amount of the invoices, less certain deductions, discussed below. It will not pay anything unless billed by the owner-operator. It pays nothing directly to the brokers' employees. The Trinidad-prepared forms are not used by the larger owner-operators, such as Arms, which uses its own forms. To do so, Arms gives its drivers time books and instructs them about the method of keeping records. It, like the other owner-operators, will be paid only when it bills Trinidad. At the end of the year, Trinidad submits to its owner-operators 1099 forms showing the total amount paid during the year.

Certain of the owner-operators, some who operated their only truck and others who owned two or three trucks, but drove one, have received special favors from Trinidad. Because they were not able to buy their own health insurance or buy it at a reasonable cost, they arranged with Trinidad to be covered by its health plan.[27] Even though Trinidad's plan was intended to cover only Trinidad's employees, those who were not covered under a plan established in a collective-bargaining agreement, Trinidad, starting in 1980, gave applications for its plan to at least nine owner-operators who certified on the application form that they were employees of Trinidad. Trinidad submitted the applications as though they were correctly filled out. Thereafter, Trinidad forwarded payments to the insurance company, accompanied by forms stating that the owner-operators were its employees.[28] Trinidad also permitted a lesser number of its drivers to pay for its term life insurance.

Trinidad also advanced money to many of these same truckers and others. These advances took various forms. Trinidad paid the owner-operators their health insurance premiums first and then deducted the amounts from their statements when rendered. That was not necessarily a bimonthly transaction. Because there was no paving during the winter, Trinidad advanced the premiums for some owner-operators during the winter and then deducted the advances when the trucker rendered his first bill in the spring. (Other owner-operators paid for their health insurance in advance, without relying on credit from Trinidad.) Trinidad also advanced money for liability insurance premiums, gasoline from gasoline stations (one trucker was given Trinidad's BP credit card, which he used for not only his truck but also his personal vehicle), gasoline from Trinidad's gas pumps on its own property,[29] tires and other parts and supplies,[30] towing, body work, repairs,[31] and even license plates and tickets for trucks being overloaded. Trinidad gave its owner-operators special permission to make these charges. When SRS, a larger subcontractor, which owns 13 trucks, purchased asphalt from Trinidad, Trinidad deducted that amount from SRS's bill for trucking services. Trinidad also gave advances simply because the trucker said that he needed it and the amount was reasonable.[32] It did not insist on receiving a promissory note or other agreement to repay the advance and never charged interest. A few of the owner-operators conceded that they could not operate without the advances that were given by Trinidad. Some owner-operators purchased utility trucks, trailers, pickup trucks, and automobiles from Trinidad. Most of these vehicles were not used by them for Trinidad's business.

The Board uses the common law right-of-control test to determine whether individuals are employees, as the Union argues, or independent contractors, as the General Counsel and the Charging Parties contend, as follows:

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

News Syndicate Co., 164 NLRB 422, 423–424 (1967), quoted in *Air Transit*, 271 NLRB 1108, 1110 (1984); *Don Bass Trucking*, 275 NLRB 1172, 1173–1174 (1985); *Precision Bulk Transport*, 279 NLRB 437 (1986).

Trinidad has no license tags and pays for no maintenance or repairs or parts. It does not give performance evaluations to its truckers. The truckers pay their own taxes and insurance. They hire drivers, they train them, they set their rate of pay, they discipline or reprimand or discharge them, they set their benefits, they establish work rules, they pay their drivers' wages and benefits, and they withhold taxes from their wages. If a driver is ill, the trucker will find a replacement. The trucker has no right to assign his work for Trinidad to another owner-operator. The truckers often work for Trinidad, and the longer that they work, the more likely it is that they will stay. On the other hand, they always have the right to decline work from Trinidad, and sometimes (but not frequently) the smaller owner-operators work for Trinidad's competitors in the same paving season that they work for Trinidad. The decision to work for others is, of course, that of the individual owner-operator, who is not bound to work for Trinidad. Rather, the owner-operator bears the risk of profit or loss from his commercial venture.

These are indicia of the owner-operators being independent contractors. Cf. *C.C. Eastern, Inc.*, 309 NLRB 1070 (1992). Other than citing decisions supporting general principles of law, the only decision the Union relies on is *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1980), which was overruled to the extent that it was inconsistent with *Don Bass Trucking*, 275 NLRB at 1175. There, the Board found that the owner-operators were independent contractors, despite the

[26] Trinidad pays its employees weekly.

[27] Their driver-employees who drove their other trucks were not covered.

[28] Helf insisted that the insurance agent knew that Trinidad had in its health plan some persons who were not its employees. There was no documentary evidence that the insurer was so advised, and I doubt that Helf was telling the truth.

[29] Trinidad stopped permitting the sale of gas from its own pumps in July 1992.

[30] Richard Rose Jr. testified that he used Trinidad's suppliers for truck parts because Trinidad, a large company, could buy the parts cheaper than he could as the owner of one truck.

[31] Some of the repair bills were so large that the company that performed the repairs billed Trinidad on a monthly payment plan; and Trinidad deducted from the owner-operators' payments bills what it had to pay monthly.

[32] Helf believed that he had advanced on occasions money to a concrete subcontractor that could not meet his payroll. He advanced Anderson $3800. Owner-Operator Barry Booker was behind on his truck payments, and Trinidad loaned him $4000 or $5000.

fact that the employer provided parking spaces for them at a reduced rate, sold them fuel at wholesale prices, allowed them to use its credit to purchase materials and parts, stored fuel for one at no charge, and financed tractors for two of them at a saving to them. Thus, Trinidad's favors to its truckers do not affect their status as independent contractors. Other considerations aside, Trinidad's favors, such as advances, do not determine whether an employer controls another individual.

In addition, the owner-operators pay 90 to 95 percent of all their repairs directly; and Trinidad ultimately paid none of the amounts that it advanced. It made appropriate deductions for the advances from the bills rendered by the truckers, normally the next month, but sometimes over a period of months, when the trucker needed additional time to pay.[33] The purchases of some equipment from Trinidad and Helf appear to be arm's-length transactions, and they are not in any event indicia of an ''employee'' status. They could well have been purchased by an independent contractor.

It is legally insignificant that Trinidad permitted some of its owner-operators to be covered under its health insurance plan. First, not all its owner-operators were covered, and none of its employee-drivers were covered. The owners and employees of some larger owner-operators, like Arms and Bishbro, were not covered; so the favor was given to relatively few people. Second, it did similar favors for other persons who had no relationship to Trinidad, except that they were Helf's relatives or business associates. Thus, it covered Helf's mother, daughter, and brother-in-law, who had no business relationship with it; numerous employees of Aurora Sand and Gravel Company, which sold sand to Trinidad and in which Helf had a half interest (his wife owned the other half); Dotori, the spouse of an individual who had been employed by Trinidad years before; and Nick Medvick, who leases sewer and back hoe equipment to Trinidad. Finally, whereas Trinidad paid for health insurance for its employees and their dependents, it only advanced premiums but did not pay for anyone else, except Helf's mother and daughter. Thus, its coverage of all the other individuals is no more an admission that they were its employees than the owner-operators.

Similarly, I attach little significance to the fact that Trinidad paid a garnishment on Booker, and Trinidad's auditor returned the form, noting that Booker was an employee of Trinidad. The garnishment indicates that 25 percent of personal earnings due to Booker was turned over to the State of Ohio, the judgment creditor, as garnishments require. However, Helf explained that the State could have merely filed a proper lien. If the trucker admitted that he owed the money, and the amount was correct, Trinidad's policy was to pay. I find that Trinidad did so, without considering whether Booker was an employee or an independent contractor.

Here, as in *Don Bass Trucking*, supra, the owner-operators owned their trucks, in which they had invested substantial personal funds. They paid for the maintenance and repair of their trucks, and they purchased all their fuel. They were responsible for the payment of the wages and commissions of their employees and those that they hired or engaged as independent contractors. They could reject any assignment and were free to accept work from other clients, including those that were competitors of Trinidad. They turned in documentation of their work to support their bills for services rendered. The rates received by the truckers varied little and were affected by the size of the trucks. Similarly, Trinidad, like the employer in *Don Bass Trucking*, paid no employment benefits and deducted no taxes or social security from payments it made to them. I find that Trinidad's truckers enjoyed certain freedoms and bore certain risks consistent with the operation of independent businesses.

There are so many variables that the Board has pointed to in its many decisions on the status of owner-operators as employees or independent contractors that one may lose sight of the fact that the Board's views have changed over time in this most fact-intensive inquiry. As cogently analyzed by Administrative Law Judge Marvin Roth in *Central Transport*, 299 NLRB 5, 13 (1990), *Mitchell Bros. Truck Lines* was decided just before the Board changed to its current views of the right-to-control test. The correct analysis is set forth in, among others, *Central Transport, Precision Bulk, Container Transit*, 281 NLRB 1039, 1050–1058 (1986); and *Teamsters Local 483 (Ida Cal Freight Lines)*, 289 NLRB 924 (1988). Those focus on the company's control of the means to be used in attaining the result that the company seeks. Where there is ''extensive day-to-day control of the manner and means by which the owner-operators perform their work,'' the Board will find an employer-employee relationship. *R. W. Bozel Transfer*, 304 NLRB 200 (1991). Here, the truckers' functions and duties were utterly routine, requiring hardly any control by Trinidad. Trinidad set the reporting time, the destination of the asphalt, and the finishing time. Other than those restrictions, the truckers reported to Trinidad's premises, picked up asphalt, drove without directions to the jobsite, dumped the asphalt, returned to Trinidad's plant to pick up a new load of asphalt, and kept doing the same thing throughout the entire day, with no interference by Trinidad. There were no uniforms, no discipline, and no grievance machinery—nothing to interfere with the truckers attaining the result that Trinidad wanted when it contracted for their services. Added to my prior finding that Trinidad's truckers were independent businesses, Trinidad's lack of control leads to the conclusions that it did not retain the right to control the actual manner and means by which its truckers performed their services and that the common law agency test for employee status has not been met.

That Trinidad used only independent contractors to do its hauling of asphalt does not, without more, convert the Union's strike into illegal secondary activity.[34] Tiboni be-

[33] Sometimes Trinidad simply advanced money. Booker pumped gasoline from Trinidad's pump in early December 1991 and only half the amount ($239.70) was deducted from his bill for the second half of that month. However, the other half was not deducted until May 1992, when Booker rendered his first bill for that year.

[34] Sec. 8(b)(4)(i) and (ii)(A) and (B) provides that it shall be an unfair labor practice for a labor organization

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to

Continued

lieved in good faith that Trinidad's owner-operators were employees within the meaning of the Act. Helf had twice promised to permit an audit of Trinidad's records and to make contributions on behalf of such as were found to be employees. He had reneged on his agreements. Until this proceeding, the Union and its Funds had not seen Trinidad's records. Now the Union has, only as a result of Trinidad's compliance with subpoenas duces tecum served during the course of this proceeding, and not as a result of Helf's voluntary compliance with the Funds' requests. Had he complied, the Union might never have engaged in a strike. Merely because the Union did, and now has been shown to be incorrect in its assumption that contributions were owing, does not make its activity an unfair labor practice. Having found that it proceeded only in its mistaken belief that Trinidad was violating its agreement, and having discredited Helf's testimony that Tiboni was seeking to organize the owner-operators, I conclude that there was no secondary boycott or threat to continue one in violation of Section 8(b)(4)(i) and (ii)(B).

The complaint further alleges that the Union's picketing violated Section 8(b)(4)(A) because it was commenced to force Trinidad to enter into the settlement agreement, an illegal 8(e) agreement that the General Counsel, the Charging Parties, and Trinidad want the Union not to enforce. No party points to any clause in that agreement that has any secondary object, no less a provision whereby Trinidad agreed to cease doing business with anybody. What the General Counsel and the employers appear to object to is Trinidad's commitment to pay contributions to the Health and Welfare Fund for all its owner-operators, who are independent contractors. The authority on which they rely, however, involve contracts directly affecting the employment of persons who were not employed by the employer. For example, *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974), remanded 512 F.2d 564 (D.C. Cir. 1975), supplemental decision 223 NLRB 752 (1976), enfd. 546 F.2d 989 (D.C. Cir. 1976), required all long-distance drivers (owner-operators) to be employees covered by the union contract, despite the fact that they were independent contractors and not employees. *Teamsters (California Dump Truck)*, 227 NLRB 269 (1976), involved a clause that required nonunion subcontractors to establish a health and welfare fund that either provided benefits equal to those provided by the union or that cost the subcontractor as much as the union's fund cost. However, cash payments could not be made to the employee in lieu of a fund. That, the Board found, had a secondary object, seeking to dictate the type of benefits payable to the subcontractor's employees. *Carpenters (D & E Corp.)*, 243 NLRB 888 (1979), involved an agreement in which the employer was responsible for the fringe benefits owed not only by him but also by any of his contractors or their subcontractors and gave the union the right to withhold services from any or all jobs of that employer to cure the delinquency. The Board held that: ''[T]he clauses are secondary in thrust because they are directed at furthering union objectives generally and regulating labor policies of employers other than those which are a party to the contract.'' Id. at 890. The Board explained that: ''the contract terms look to economic pressure for enforcement of secondary agreements.'' Ibid.

There is no term of the settlement agreement that regulated the labor policies of the owner-operators. The settlement agreement did not affect the relationship of the independent contractors to their employees or further union objectives generally. It did not require the unionization and inclusion under the collective bargaining of any independent contractors who sought to do business with Trinidad. *Operating Engineers Local 601 (Lease Co.)*, 276 NLRB 597 (1985). It required only that Trinidad pay to the Health and Welfare Fund on behalf of the employees of Trinidad. The agreement, the strike, and the complaint did not deal with the issue of area standards, as to which Masters wrote a letter sometime after the execution of the settlement agreement. His views, not adopted by Tiboni, had nothing to do with what the General Counsel was complaining about.

Furthermore, the settlement agreement provides:

> Trinidad agrees to comply and timely tender contributions to the Funds *pursuant to the collective-bargaining agreement and any subsequent labor agreement containing the same or similar contractual obligations* for all owner-operators and drivers of leased equipment for the period beginning September 1, 1992. [Emphasis added.]

The provisions of the collective-bargaining agreement (arts. 20 and 21) require that contributions be made ''for each employee.'' Contributions are thus due only on behalf of those owner-operators ''found due and owing.'' All that could be found ''due and owing'' were contributions for employees. There is nothing secondary about this. In light of my finding that there are no owner-operators who are employees, nothing is owing. It might be argued that, because nothing is owing, the Union must have engaged in the strike for some other reason. However, there is nothing in the agreement about the renewal of the union signatory clause found illegal, above. In light of my crediting Tiboni that he was not interested in signing the owner-operators to Union contracts, that was not an object of the settlement agreement. The employers and the General Counsel make much of the Broker Agreement prepared by Tiboni. They argue that the document proves that Tiboni was lying. That does not necessarily follow. Indeed, when Helf began to send his truckers to sign up at the Union, Tiboni was unprepared for them and had to send them away. That was not the action of a person who anxiously awaited their arrival in order to obtain new employers under union contract. In fact, as I have found above, Helf was engaging in this practice solely to avoid the responsibility that he thought that he had. Tiboni's prepara-

---

threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

tion of the Broker Agreement was merely his response to Helf's action. By consequence, I conclude that the Union did not violate Section 8(b)(4)(A) of the Act and that the settlement agreement did not violate Section 8(e).

In light of my conclusions of law, it is undoubtedly anticlimactic to deal with two of the Union's defenses; but perhaps the following might be of some help, if exceptions are filed to this decision. First, the Union contends that, in the settlement agreement, Trinidad has released the Union from all unfair labor practice activity. The NOCA agreement provides that it ''will be mandatory to strike'' Trinidad in the event it fails to make contributions to the Funds. Because there were no contributions due, the Union may have violated the contract. I am unwilling to honor a release executed by Helf solely because of the pressure of a strike called possibly in breach of a collective-bargaining agreement.

Second, the Union contends that: ''The Board may not adjudicate claims which are identical to those already pending before a court which has primary jurisdiction,'' relying on *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). That is not the Court's holding. The Court held that courts have the jurisdiction and the obligation to determine the legality of a contract where illegality under the Act is raised as a defense. The Court also held that the exclusive primary jurisdiction of the Board to resolve unfair labor practice issues did not preclude judicial determination of the issue because: ''a court must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place.'' Id. at 84. On the other hand, when similar issues are before both tribunals, the question raised is whether the courts should exercise their jurisdiction in a particular case, because the jurisdiction of the Board to remedy unfair labor practices does not defeat the jurisdiction of the courts to enforce a contract. *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962). That being so, even if the district court continued to assert jurisdiction over the Funds' claim, the Board might continue with its own prosecution of the violations alleged herein, particularly because all the violations are not the subject of Trinidad's 8(e) defense in the district court (here there are multiple violations of Section 8(b)(4) alleged) and because the relief to be granted by the Board is quite different from the relief that might be afforded by the court. Of equal significance, the Funds moved to stay this proceeding, and the Court, on February 28, 1993, decided not to exercise its jurisdiction, denied the Funds' motion to enforce the settlement agreement, and dismissed the action, noting that:

> While Tiboni is correct that this Court retains jurisdiction to enforce the agreement, this Court believes that the issue of the secondary boycott and the issue of the legality of the settlement agreement are so intertwined that it is appropriate to await the resolution of the dispute currently pending before the NLRB before taking any action to enforce the settlement agreement.

The Court retained jurisdiction to vacate its order ''if further litigation is necessary after the NLRB has issued a final ruling.''

Finally, the complaint alleges that Trinidad was a party to all the violations of Section 8(e), as was the Union. The same findings of fact and conclusions of law apply. I conclude that Trinidad violated the Act, but only regarding the union signatory clause in the collective-bargaining agreement.

The unfair labor practices found herein, occurring in connection with Trinidad's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Union and Trinidad have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The only unusual remedy I have recommended is the requirement that Trinidad mail the notice to its owner-operators. That is proper because Trinidad mailed its September 11 letter to certain of its owner-operators, advising that they had to sign union agreements in order to continue working for Trinidad.[35]

[Recommended Order omitted from publication.]

[35] Trinidad's motion for reconsideration of my ruling striking the testimony of Bruno Panzarello is denied. The witness related nothing that would have helped to determine the purpose of the strike.